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THESIS

A MANAGER'S GUIDE AND PROGRAM EVALUATION
OF ARBITRATION IN THE FEDERAL SECTOR

by

James Clifton Davis, III

December 1982

Thesis Advisor: R. S. Elster

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The conclusions provide managers with an evaluation of the strengths and weaknesses of arbitration in the federal sector and provide mid-level managers with a guide to the procedural steps up to and including the arbitration process. Strengths include those benefits derived such as protection of employee interest, political and social stability, and inferred public and private wage parity. Weaknesses are the unmeasurable cost to the tax payer resulting from the allocating of scarce public resources by non-representative third party arbitrators. Recommendations are made for further cost benefit analysis on subjects relating to arbitration in the federal sector.

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A Manager's Guide and Program Evaluation of Arbitration in the Federal Sector

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requirements for the degree of

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I. INTRODUCTION

A. GENERAL

The growing reliance in the federal government on arbitration for resolving disputes between labor and management has been accompanied by numerous debates over the merits of "binding" or "compulsory" third party settlements (arbitration). Some maintain that arbitration removes "precious freedom" from the bargainers since the essence of binding arbitration is the imposition of a third party's opinion. [Morse, 1963] Others argue it to be incompatible with collective bargaining because of the "narcotic" and "chilling" effects. [Bloom, 1981] Anon states that arbitration is mostly political and that earnings and fringe benefits of public employees are catching up with and surpassing wages and benefits of private employees at tax payers' expense. [1975]

The basic aims of this thesis are to examine the costs and benefits that are derived from arbitration, to determine if the process and its use is a beneficial and viable concept, and to provide needed information to mid-level managers about arbitration in general.

It is not always feasible to conduct a complete economic analysis/program evaluation. However, within the limited scope of this thesis, selected resources and expenditures used to achieve arbitration objectives will be investigated.

B. BACKGROUND

The grievance process has generally been accepted as the means to settle disputes between labor and management. Most collective bargaining agreements provide machinery for the purpose of settling disputes arising during the term of the labor contract. Grievance procedures take many forms, but ordinarily, the first three or four steps use what is called "negotiation techniques." These techniques are a means by which the grievance is carried through the levels of authority within the federal government and the unions involved. If these steps of negotiation fail, then the final level of bargaining, arbitration, is used. At this point, the parties involved say, "We cannot settle it. Let's bring in somebody from the outside and have him tell us what to do. His decision will be final and binding." Federal unions and their members are becoming more influential and these unions are becoming very skilled at using the legally established grievance process to their membership's benefit. [Updegraff, 1970]

Today's manager must do more than just acquaint himself with this collective bargaining process because he will be faced many times with many different types of settlement and grievance scenarios. As each side becomes more aware of the power of those rights and laws, some observers believe more federal cases will go to arbitration. [Loevi, 1978] Despite

the growing importance of arbitration, an "evaluation" of this process has escaped public attention. For example, the general public does not really understand all the events leading up to the unsuccessful conclusion of the recent confrontation between the federal government and the federally employed air controllers. Even if the arbitration effort had been successful, the basic question of cost and reward would not have been publicly announced or published. There seems to be ample literature on the general subject matter of arbitration, but there are gaps at the mid-manager's level and few attempts at program evaluation at any level.

C. ORGANIZATION

Chapter II of this thesis describes the legal relationships between compulsory arbitration, employee rights, management rights, and the duties of the federal agencies and labor organizations involved in ensuring compliance in those areas. It also briefly discusses the role of the Federal Service Impasses Panel and exceptions to arbitrator's awards.

Chapter III provides an explanation of the process for selecting an arbitrator to preside over the arbitration hearing itself. This chapter generally defines the types of arbitrators and presents pros and cons of those types.

Chapter IV deals with the decision to arbitrate or not, and specifically addresses the question of the "arbitrability" of a grievance issue.

Chapters V and VI discuss how to prepare and present an arbitration case. These chapters provide a recommended step-by-step procedure for handling the problems within their specified area.

Chapter VII evaluates arbitration by setting cost and benefit criteria in such areas as "protector of employee interest," "inhibitor of collective bargaining," etc., and examines the effect of arbitration on wage and fringe benefits both in the public and private sectors.

Chapter VIII summarizes the conclusion of this research and makes recommendations for further research.

D. RESEARCH METHODS

Several means of research were employed. The "Guide," Chapters II through VI, was derived from research of materials published and interviews with professional arbitrators. These were combined to form a comprehensive yet easily understood explanation of events leading to and during arbitration.

Chapter VII, the economic analysis and program evaluation, presented quite a few problems, although the problems associated are not unique to evaluation of public sector programs. [Gramlich, 1981] Physical yields were used when

available and lent no difficulty to this endeavor; the problem arose when trying to place a quantitative measurement on outputs that are not quantitative in nature. [DOD, 1972] Descriptive and comparison analysis took a leading role in the evaluation of non-quantifiable areas. Research will cover historical data on grievance issues, case load, and arbitration cases on file, their demands, judgments and "cost" and "benefit" information.

II. ARBITRATION AND THE LAW

A. BACKGROUND

Federal labor and management relations are governed by Title VII of Public Law 95-454 of the Civil Service Reform Act of 1978. [CSRA, 1978] In general, Title VII was established under the principle that labor organizations and statutory protections of the right to organize and bargain collectively in the Federal Civil Service are found to be in the public interest. Title VII takes into consideration and recognizes certain unique requirements in the federal sector and the need for efficient, effective government operations. Title VII describes in detail the provisions of labor management relations, the rights and obligations of federal agencies and labor unions. Title VII also details the grievance, appeal and review procedures, plus other administrative processes. [CSRA, 1978]

The employees' right to organize in the public sector, bargain collectively and participate through labor organizations of their own choosing is said to safeguard the public interest, contribute to the effective conduct of public business and, most importantly, facilitate and encourage the amenable settlement of disputes between employee and employer involving conditions of employment. It is the intent of Public Law 95-454 to command the highest standards

of employee performance in matters that are in the public's benefit and to facilitate, through the continued development and implementation of modern and progressive work practices, specifically those procedures leaning toward arbitration, competent accomplishment of government business. [Coulson, 1978]

The employment of binding arbitration in the federal sector originated in the 1969 Interagency Study Committee's report and its recommendations on labor-management relations in the federal service. This report resulted in the issuance of Executive Order No. 11,491 in October 1969. This order legalized the use of arbitration to resolve grievances arising under collective bargaining agreements. This manner of handling grievances as part of the Federal Sector Labor-Management Program has increased substantially. The use of the arbitration process, which is now a well established means of settling collective bargaining disputes, promotes the basic goal of constructive and cooperative relationships between federal sector labor organizations and management officials. Thus, disputes in the federal sector are adjudicated, not in a forum imposed on disputants by law or executive order, but by an impartial third party who has been chosen by parties involved in the dispute. [Frazier, 1977]

B. EMPLOYEE RIGHTS

The Civil Service Reform Act provides a vehicle for federal employees to exercise the right to form, join or assist any labor organization or, on the other hand, to refrain from participating in such activity. This right is to be exercised freely without fear of penalty or reprisal. Each employee will be "actively" protected in the exercise of those rights. [CSRA, 1978]

The individual employee may act for a labor organization in the capacity of a representative, presenting the views of that labor organization to the heads of agencies or appropriate authorities. He has the right to engage in collective bargaining with respect to conditions of employment and the right to binding arbitration. [CSRA, 1978]

C. FEDERAL LABOR RELATIONS AUTHORITY (FLRA)

The Federal Labor Relations Authority was established by public law to provide leadership in the inception and installation of policies and guidance relating to labor-management relations. The FLRA is the governing body responsible for carrying out the provisions as set forth in Title VII. The Authority's General Council investigates alleged unfair labor practices, and has direct authority over and responsibility for monitoring civil service employee-management relations. [CSRA, 1978]

The Federal Labor Relations Authority determines the appropriateness of labor organization representation and supervises or conducts elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees. The Authority has the power to conduct hearings and resolve unfair labor complaints and to resolve exceptions to an arbitrator's awards under Title IV. [CSRA, 1978]

D. MANAGEMENT RIGHTS

Title VII generally states that nothing within the legal phraseology will be interpreted so that it shall affect the authority of any management official in determining the mission, budget, organization, number of employees and internal security practices of his agency. More specifically, this means that management, within legal restraints, has total authority to hire, assign, lay off and retain employees. Management may also suspend, remove, reduce in pay grade or take any other disciplinary action against its employees. A manager, within applicable laws, may also assign work and promote from properly ranked candidates. But a manager is strictly prohibited from doing anything that would preclude any labor organization from negotiating working conditions. [CSRA, 1978]

E. RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

The exclusive recognition of labor organizations is granted in that all governmental agencies shall accord exclusive recognition to a labor organization if that organization has been selected as the representative in a secret ballot and by a majority. The agency for which this majority works must grant exclusive recognition. How employees may select a labor union, how possible discrepancies in the exclusive representation appointment are handled, and the power that the National Labor Relations Authority (NLRA) may exercise in controlling and settling disputes in that area are all covered under the Civil Service Reform Act of 1978.

The "exclusive right concept" is important to this thesis as this "right" is granted only to the party that can legally act for labor in any formal discussion with management, including arbitration. Of course, those items to be discussed range from general working conditions to unfair labor practices as described in Section 7116 of Section VII of Public Law 95-454. [1978]

As part of the basic foundation of collective bargaining is the "duty" to bargain in "good faith." This obligation required of both parties is the crux of the intent of the collective bargaining process and arbitration, and ties directly back to the goal of Section VII of Public Law 95-454. This goal, reiterated here, is:

to promote constructive and cooperative relationships between federal sector labor organizations and management officials.

F. NEGOTIATION IMPASSES AND THE FEDERAL SERVICE IMPASSES PANEL

If negotiations break down between labor and management, the Federal Mediation and Conciliation Service is required to provide services to assist in the resolution of negotiation impasses not only to the federal agency, but also to the labor union involved. If this procedure fails, the parties may agree to adopt a procedure for binding arbitration but only if this procedure is approved by the Federal Services Impasses Panel. The Federal Services Impasses Panel is a department within the Federal Labor Relations Authority and is chartered to provide services to management and labor to resolve impassed labor disputes. [Loevi, 1978]

After all avenues of voluntary negotiation have failed, the Impasses Panel shall after hearing all the evidence, pass judgment and this judgment will be binding (same scenario for any third party arbitrator). [Kagel, 1961]

G. EXCEPTION TO ARBITRAL AWARDS

Even though it is generally accepted that arbitration is binding (assuming both parties are negotiating in good faith), either party may appeal an arbitrator's decision to the National Labor Relations Authority (NLRA). This appeal

may be upheld and the award may be overturned if it is contrary to any law, rule or regulation. If there is no appeal to the arbitrator's award filed, then the arbitrator's award will be final and binding. [Coulson, 1978]

H. SUMMARY

This chapter has summarized the basic legal concepts dealing with labor-management relations and details policy dealing with labor organizations and statutory protections of the right to organize and bargain collectively in the Federal Civil Service. This in itself is proclaimed as being in the "public interest." The Civil Service Reform Act of 1978 recognizes certain special requirements of the federal sector and the need for efficient, effective government operations.

The CSRA is broad in scope and includes personnel policies, practices and matters affecting working conditions. The representation rights entitle the exclusive union representative to be present at all formal discussions between management and employee in the bargaining unit concerning any grievance or any personnel policy or practice or other general condition of employment.

The law not only allows for employee participation in organized labor organizations but requires management to actively protect that right so that the member may belong to said organization without fear or penalty.

There are strict standards of evidence in arbitration cases and arbitration awards may be reviewed on the grounds that those standards are not abided by. The issue of "arbitrability" will be decided by the third party arbitrator. If voluntary arrangements, including mediation, fail to resolve bargaining impasses, either party may request action be taken by the Federal Service Impasses Panel, which can direct a settlement. It is important to note that the disputing parties can only use arbitration if authorized by the Impasses Panel.

III. SELECTION OF THE ARBITRATOR

A. GENERAL

Usually, the labor agreement negotiated between labor and management stipulates how an arbitrator will be selected. If the disputing parties cannot agree and the labor agreement does not stipulate how an arbitrator is to be selected, the American Arbitration Association (AAA), a private association, or the Federal Mediation and Conciliation Service (FMCS), a government agency, can provide assistance. [Coulson, 1978] This assistance is usually in the form of providing a list of qualified abritrators to choose from. The FMCS may, on the other hand, complete the selection process by simply appointing an arbitrator that it considers suitable. There are many forms of "arbitrator," some of which are the single arbitrator, the umpire system and the tripartite. [Loevi, 1978]

The selection process is initiated when the Secretary of Labor along with the Federal Service Impasses Panel determines that arbitration is required. Most federal agencies have written into their labor agreements a stipulation for the use of an "ad hoc" selection basis. An "ad hoc" selection is one in which the selection of an arbitrator is appointed for one particular arbitration proceeding. This selection is made from a list provided by the AAA or FMCS.

These two organizations screen their list to ensure high caliber and strictly neutral membership. [Coulson, 1978]

B. THE SELECTION PROCESS

The selection process is usually initiated by the submission of a "demand for arbitration" by either of the negotiating parties. After receipt of this "demand," the AAA or FMCS will provide a list of five to seven qualified arbitrators to select from. Each party then takes turns in striking out a name until one is left. [Coulson, 1978]

Prior to selection, finding out as much as possible about an arbitrator can be very important to the parties in the dispute, especially if that information can be used to determine if a particular arbitrator has displayed a certain style or displayed certain sympathies in the past that would be beneficial to the cause. The obvious question that should be asked is how does one proceed to obtain this valuable information, information that may help in the selection of an arbitrator that will be in sympathy with one's cause. Such information is limited, as is the system which one is forced to use. [Coulson, 1978]

The Bureau of National Affairs, Inc. and the Commerce Clearing House, Inc. regularly publish the decisions of most arbitrators. Therefore, it is possible to find information on the particular decisions made by particular arbitrators in the past. But one should read these decisions with

caution as the afore-mentioned organizations do not publish all of the case decisions. An arbitrator may in certain instances be prohibited from submitting his decision by either of the disputing parties or the arbitrator may choose not to submit his decision for reasons of his own. One may expect to find a limited portion of the arbitrator's viewpoint and more than likely only that portion of his output he considers more to his benefit. The case as written may not be related to the specific dispute at hand; this along with the above comments could result in some benefit in the selection decision, but most likely will end up being simply an insight into the arbitrator's style and possibly his personal approach to problem solving. Probably, the most useful source of information about a particular arbitrator may be from other parties that have actually had prior working knowledge and dealings with the arbitrator himself. [Loevi, 1978]

No two arbitrators are alike in experience level. Therefore, the selection process is no trivial matter. Both the AAA and FMCS will submit pertinent biographical data on each arbitrator, including education, occupation and work experience and, of course, cost data such as fees, etc. Another highly recommended source of information is the Civil Service Commission Labor Agreement Information Retrieval System. This system has a reputation for fair, honest and objective evaluation of individual arbitrators. [Loevi, 1978]

The sources of information about an arbitrator are suspect and provide very selective data at best. The data received stems from written decisions and is screened by the publication. Information obtained from sources such as union or management representatives that have had past case experience are subjective judgments that are slanted and colored. These subjective opinions are arrived at by reasons not the least of which is whether the case was won or lost.

C. TYPES OF ARBITRATORS

When dealing with choosing either an "ad hoc" arbitrator or a permanent arbitrator, one should consider the following: to eliminate time and effort needed to select arbitrators, to familiarize them as to the local conditions before cases can be decided or awards submitted, and basically, to ensure consistency of the decisions, it may seem logical to retain the services of an arbitrator on a permanent basis (umpire system). Nevertheless, the umpire system is not used often in the federal sector. [Coulson, 1978] This will be discussed in more detail later in this section.

Another decision is the selection between a single arbitrator and an arbitration panel. Penels are usually tripartite in construction and are established by first having each party select one arbitrator, those two then selecting a third. All three arbitrators are supposed to hear the case as neutrals. Most of the decisions handed

down by tripartite panels are on a two-to-one vote. [Coulson, 1978]

There are in all of the above types of arbitration selection techniques, potential hazards. In the permanent umpire situation, easy access to an arbitrator is obtained. This may give the disputing parties an inverse incentive in that they might tend to be lax in discharging their responsibilities under the established grievance procedures. In other words, the parties would simply use the grievance procedure as a pro forma route to the permanent arbitrator. The retention of a permanent arbitrator involves a long-term agreement for services and, if the parties become dissatisfied with the arbitrator's style, decisions, etc., it could result in very negative consequences for both parties. [Loevi, 1978]

In the tripartite panel most decisions are handed down as previously stated: by a two-to-one vote. One might ask why this system is used when it seems that the arbitrators selected from each party vote for their parties' cause and the third party arbitrator makes the deciding choice as if he were a single arbitrator anyway. The plain truth is that each party wants a representative present during the deliberations. Is there any real advantage? At first glance it appears not because of the obvious delays in the process resulting from panel deliberations as well as the added cost

of having three arbitrators. The view seems to be widely held as the tripartite panel is unpopular with both management and labor alike. [Loevi, 1978]

Given the considerable savings in time and effort devoted to the selection process, it would seem that a permanent arbitration system in the federal sector where there are significant arbitration case loads would be extremely attractive if those pitfalls mentioned above could be circumvented. Other than what has been discussed, the literature seems to favor "ad hoc" selection regardless of time and cost obstacles.

D. SELECTION PROCEDURE

No single part of the arbitration process is any more important than the selection of the arbitrator. [Kagel, 1961]

Upon receipt of a demand for arbitration, the AAA or FMCS will acknowledge its receipt to the party concerned and send a list of proposed arbitrators. This list is not just randomly submitted, but is made up of the arbitrators that the agency feels are best qualified to handle the situation as described by the union's statement of the nature of the dispute. Basic information about each arbitrator is attached to the list. When the list is received by both parties, they in turn cross off the unacceptable names and state their preferences of those who are left. [Loevi, 1978]

Once the choice is made, the list is forwarded to the AAA or FMCS and is routinely approved. The arbitrator is contacted and the nature of the case discussed to see if there is any reason why he cannot act with impartiality in a dispute between the two parties. The Code of Professional Responsibility governs the discussions and disclosures when this interaction is being accomplished. [Coulson, 1978]

If both parties are unable to reach a mutual decision on the selection of an arbitrator, additional lists may be petitioned but only by the solicitation of both disputing parties. If both parties still cannot agree on a selectee, then the AAA or FMCS is authorized to make an administrative appointment. This appointment will not be an arbitrator whose name was crossed out by either party on the prior list or lists. Such an appointment, because of information received about the specific grievance issues and the disputing parties themselves from the appointing agencies' local representatives, can be informed and sensitive. It should be pointed out that the AAA and FMCS serve as expediting agencies and act for both labor and management. [AAA, 1979]

In selecting an arbitrator, labor and management will want to ensure that the arbitrator is competent to understand the particular kinds of issues that will be involved in the case. In other words, does he have the capability to

sift facts, have the technical expertise and have a particular philosophy which would make him suitable to weigh the issues of this or that specific situation? [Beal, 1982]

The actual selection of arbitrators in the past reflects an unfortunate by-product that is inherently built into the selection system. This by-product is that disputing parties are hesitant to accept an unknown factor. Therefore, the tried and true arbitrators are used over and over again and it is extremely difficult for a new and aspiring arbitrator to get selected. He will encounter measurable resistance to his bid for acceptance in the field. [Coulson, 1978]

IV. THE ARBITRATION DECISION

A. GENERAL

The decision to arbitrate deals with subjects such as arbitrability, case merit, political considerations and cost. The arbitration process, to resolve a grievance, will entail the expenditure of considerable effort and resources. Therefore, all avenues for settlement should be exhausted prior to initiating the arbitration process. [Loevi, 1978]

Arbitration is a participatory system that involves many individuals from both management and labor. Since arbitration takes the final decision out of the hands of the disputing parties, both must protect their interest by making every possible effort to prepare and present their case in the best manner possible. The case must be prepared to convince the arbitrator that this position is the correct one. How? By the logical presentation of facts and arguments. [Kagel, 1961; AAA, 1981]

B. ARBITRABILITY

The first decision to be considered is that of arbitrability. In the federal sector this question is far from moot as Executive Order 11491 details specific exclusions from the coverage of grievance and arbitration procedures. [Loevi, 1978] Generally speaking, the determination that a dispute is arbitrable is basically a decision

whether arbitration procedures, as defined, are in fact permitted to cover that subject under dispute. [Updegraff, 1979] An example of what would not be arbitrable is a disputed item for which a statutory appeal procedure already exists.

The elimination of disputed items covered by statutory appeal is peculiar to the federal sector in that it rules out such subjects as classification appeals, discrimination appeals, performance ratings, etc. It is noteworthy that more than twenty types of management actions are basically exempt from arbitration. [Coulson, 1978]

The question of arbitrability simply is a statement of whether an issue can or cannot be properly decided by a neutral party. There are two basic questions to ask when discussing arbitrability:

(1) Is the process procedurally correct?

(2) Is the matter substantively arbitrable?

[Coulson, 1978; Loevi, 1978]

The question of procedural correctness is simply asking if the labor representative has followed the properly established grievance procedures. The question of substantive arbitrability is asking whether the subject matter of the grievance itself should or should not be an issue that can be settled through arbitration. In short, a substantive arbitrability question is a challenge that the nature of the

grievance does not fall within the negotiated contractural relationship; therefore, the arbitrator has no authority to resolve it.

Disputes as to whether or not a grievance is subject to statutory appeal must be submitted to the Assistant Secretary of Labor for Labor Management Relations. [Updegraff, 1970] The concern over making a single body responsible for this decision in determining questions relating to the coverage of statutory appeal procedures is reflected in the revision of Section 13(d) of Executive Order 11491:

> Questions that cannot be resolved by the parties as to whether or not a grievance is on an item for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for his decision. Other questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision.

It is important to note that here the Assistant Secretary is taking on the role of an arbitrator and that, once this question is referred to him, his decision is final and may not be referred back to the parties for a decision by another arbitrator.

The arbitrator that has been selected by the two feuding parties or appointed by the FMCS normally, if both parties agree to submit to his authority, rules on the question posed above. Except that the arbitrator has no authority over issues that are already covered by statutory regulations. [Loevi, 1978]

C. POLITICAL CONSIDERATIONS

Since both management and labor do not operate in a vacuum, there are political considerations that affect their actions. Both parties have political constituencies to consider and, in some situations, these constituencies are a principal factor in course determination. [Anon, 1975]

Theoretically, politics should play a very minor role in the decision to carry a grievance to arbitration. Needless to say, there is often a very wide gap between the theory of pure idealistic grievance arbitration and inter/intra-organization practice. The political motivation for a union to arbitrate usually stems from the need to demonstrate that they are active. The more the labor representative unit is involved in this area, the need to demonstrate employee advocacy is more or less satisfied. This type of involvement relates to a measurement of union effectiveness in the eyes of the union membership. The more visible the actions of the union are, the more effective its membership believes it to be. The same principle applies and holds for those actions by management. [Anon, 1975]

V. CASE PREPARATION

A. GENERAL

The preparation process is probably the most difficult and time consuming aspect of arbitration. By the time the grievance case has reached this stage, representatives of both parties have usually spent many hours discussing the grievance and have become very familiar with all aspects of the case. If they are unable to settle the dispute, both labor and management now face the enormous problem of presenting their position in a factual and logical manner to an arbitrator. Although great effort has been exerted in choosing an arbitrator that has some expertise in the field of the disputed grievance, the arbitrator usually lacks detailed knowledge of the case until the hearing stage begins. [Coulson, 1978]

B. PROCEDURAL STEPS

Proper preparation for cases going to arbitration will always entail such preliminaries as evidence gathering and witness interviewing. As Robert Coulson explains in his book on labor arbitration:

> Effective presentation of the facts and arguments must begin with thorough preparation. [1978]

He recommends the following steps:

1. Study the original statement of the grievance and review its history through every step of the grievance machinery.

2. Review the collective bargaining agreement from beginning to end. Often, clauses which at first glance seem to be unrelated to the grievance will be found to have some bearing.

3. Assemble all documents and papers you will need at the hearing. Make photostatic copies for the arbitrator and for the other party. If some of the documents you need are in the possession of the other party, ask that they be brought to the arbitration. The arbitrator usually has authority to subpoena documents and witnesses if they cannot be made available in any other way.

4. Interview all of your witnesses. Make certain they understand the theory of your case, as well as the importance of their own testimony. Run through the testimony several times. Role-play the probable cross-examination.

5. Make a written summary of the testimony of each witness. This can be useful as a checklist at the hearing, to ensure that nothing is overlooked.

6. Study the case from the other side's point of view. Be prepared to deal with opposing evidence with arguments.

7. Discuss your outline of the case with others in your organization. A fresh viewpoint will often disclose weak spots that you may have overlooked.

8. Read published awards on the issue that seem to be involved in your case. While awards by other arbitrators on cases between other parties are not decisive as to your own case, they may be persuasive. The American Arbitration Association has published summaries of thousands of labor arbitration awards in its monthly publications. Use these summaries and their cumulative indexes as research tools.

[Coulson, 1978]

Clearly, part of the preparation should begin the moment the grievance occurs; but, in following the above checklist,

the prehearing preparation becomes a logical sequence of events instead of a hit or miss attempt.

When analyzing the present labor agreement, try to ascertain the pertinent provisions relating to the dispute. Study the agreement as a whole and then apply the particulars to the fact in question. Research previous agreements to see if any changes have been made or if other cases have been settled under the specific disputed fact by mediation or by arbitration in the past. [Frazier, 1977; Coulson, 1978]

The study of grievance committee minutes and other documents used by the grievance committee can produce invaluable background information and may actually disclose the "theory" upon which the other party is basing its case. [Updegraff, 1970; Coulson, 1978]

The study of grievance committee minutes and other documents used by the grievance committee can produce invaluable background information and may actually disclose the "theory" upon which the other party is basing its case. [Updegraff, 1970; Coulson, 1978]

When interviewing witnesses, ensure that a detailed written record of the interview is maintained. Based upon this interview, one should determine what the nature of his testimony is and whether his testimony should be used. By that statement, it is meant that one should size up the witness; try to evaluate him as to what kind of impression

he would make and whether his testimony will positively affect the arbitrator's decision. [Updegraff, 1970; Coulson, 1978]

It is important to consider doing the following:

(1) Visit the scene of the dispute; prepare the witness prior to the official hearing.

(2) Decide upon and prepare exhibits.

(3) Develop the theory of the case.

[Harrison, 1979]

C. PREHEARING CONFERENCES

Prehearing conferences are an important aspect of case preparation and serve at least three important purposes. First, they provide a vehicle to handle necessary administrative questions such as time and location of the hearing. Second, they allow the parties to review jointly the issues involved and possibly to agree on specific questions to be resolved by the arbitrator. Finally, the prehearing conference can serve as a communication vehicle for the exchange of evidence and witness lists.

D. EVIDENCE GATHERING

Evidence gathering is, by nature, the primary function of case preparation. The contention in the hearing will normally be proved either by documented evidence or statements of witnesses who have first-hand knowledge of the

issue to be resolved. Evidence gathering may be varied from case to case but, according to Francis Loevi, Jr., there are various aspects of the evidence-gathering process common to the majority of cases. Allan J. Harrison, in his book, Preparing and Presenting Your Arbitration Case, recommends the following step-by-step outline to evidence gathering:

1. Assuming there is argument over language implementation, start with the contract.

    a. Write out or outline all contract provisions, or parts of provisions, that support your interpretation.

    b. Using the rules of contract construction, write out your interpretation(s). Use as many words and phrases from the contract as possible.

    c. Apply any relevant arguments based on equity, common sense, and past practice that will help support your contract interpretation.

    d. Assemble the facts and evidence needed to support the assertions made in a, b, and c above. For example:

        (1) Have the contract ready as a joint exhibit.

        (2) List any supporting facts that the other side will agree to.

        (3) Review previous contracts or written contract proposals, resolved grievances and other arbitration awards.

        (4) Screen witnesses who can testify directly to the meaning the parties gave the language during negotiations and grievance meetings.

    e. Review all of the opposing arguments and evidence you anticipate and write out a response that either:

        (1) Refutes that argument or evidence, or

(2) minimizes or diminishes its importance.

2. Assuming there is some dispute as to the occurrence that caused the grievance, follow these steps:

   a. Write out a clear chronological sequence of events, noting the dates and times, the main participants and any witnesses, the exact locations of events. In short, describe what happened in detail.

   b. See what the other side agrees with. If both of you can agree on a matter, label it a fact.

   c. List documents and witnesses that will confirm the above rendition of events.

   d. Prepare an explanation of events: Why did one event follow another? Why was the employee angry? Why did Sam get sent home?

   e. Explain why your version of what happened establishes that the company did or did not violate the contract.

   f. Next, do all the above as if you were working for your opponent. Then, prepare to rebut or diminish that position.

3. Prepare your evidence for presentation.

   a. See if you can obtain a signed, written stipulation of the facts. If not, find out what differences there are.

   b. Prepare a copy of all your documents in triplicate. Normally Xeroxing is the quickest and cheapest method.

      (1) Obtaining copies of your own documents should not be difficult; however, the other party may have documents and records which are critical to your case. Most commonly the employer has many more personnel records than does the union. If you want a given record, first make an oral request and explain its necessity in assessing the merits of the grievance. If the other party refuses to cooperate, submit the request in writing. If you are under the

National Labor Relations Act, and your adversary again refuses, file a charge with the nearest NLRB office. Also keep a copy of the request to show the arbitrator at the hearing if you have still not obtained the information. Under either state or National Labor Law, the parties are entitled to information needed to intelligently process a grievance.

(2) In order to establish their authenticity, some documents, such as notes taken in bargaining or at a grievance meeting or the daily log kept by a steward or a foreman, will probably require testimony from the individual who kept the record.

c. Decide who your witnesses will be and who will probably testify for the other party.

[Harrison, 1979]

E. WITNESS PREPARATION

Witness preparation, one of the most important aspects of case preparation is often overlooked. [Kagel, 1961]

There are basically three objectives to be met in witness preparation: First, to have the witness overcome the fear of formal proceedings. Most witnesses will be in this role for the first time and fear of the unknown may cause them to react in such a manner as to undermine their testimony.

Second, to eliminate surprise, the witness should have the opportunity to discuss thoroughly his role with counsel prior to the hearing. This forewarning of the possibility of unexpected statements may prevent actions that could be detrimental to the case.

Last, if the witness is to have credibility with the arbitrator, witness preparation must involve coordination of each witness' testimony. This coordination will eliminate gaps and redundancies and will better present the case as a total picture instead of a piecemeal happening of individual events leading to the dispute.

Witness preparation consists of at least three phases that might be labeled as the initial interview, follow-up, and coordination phases.

The initial interview, in concurrence with the evidence gathering interview, will provide the witness with a first glimpse at answering questions with regard to the specific issues of the case. It is recommended that this conversation be taped for several reasons. First, it allows the witness to become acquainted with the feeling of testifying "on the record." Second, it provides an accurate account of the conversation, one that is instantly recalled for review. Last, it allows the interviewer to observe the witness' reaction and poise without having to worry about note taking.

During the follow-up interview, it should be possible to develop an outline and to present to each witness what is expected of him in his testimony and give the interviewer the opportunity to practice with the witness.

The coordination of witnesses to develop a comprehensive step-by-step "big picture" case is important. [Harrison, 1979]

In this phase, witnesses will become familiar with and understand that testimony from other witnesses will form a cohesive case. It puts the case in perspective and eliminates mystery. [Loevi, 1978]

F. SUMMARY

Case preparation deals with the central question of whether or not the employer violated the contract language and what is the proper settlement if a violation has been committed. Serious preparation for an arbitration hearing cannot be undertaken without first formulating a theory of the case. Without this formulation, it becomes almost impossible to separate what is relevant from what is irrelevant in the evidence-gathering phase. Without theory formulation, considerable time and effort may be wasted on useless activities.

VI. CASE PRESENTATION AND THE ARBITRATOR'S AWARD

A. GENERAL

The principal task in this phase of arbitration is to present the evidence to an arbitrator, an arbitrator who normally has little or no knowledge of the case prior to the hearing. So, one may say, the hearing is an opportunity to educate the arbitrator of the facts supporting the disputing parties' arguments. [Loevi, 1978] The hearing is a chance to place all the evidence in support of the case before the neutral party in an orderly fashion. [Harrison, 1979]

The arbitrator is the key person in the hearing phase of arbitration. He conducts the hearing, decides on the admissibility of evidence and makes the final and binding award on the issues submitted to him. This should not be forgotten by party advocates when presenting the case. The hearing is the climax of the arbitration procedure and the arbitrator is to ensure that it is a full and fair process, not to satisfy both sides, but to reach a fair decision based strictly on the record as presented. [Harrison, 1979]

Despite the informal, voluntary and usually very friendly character of the hearing proceedings, it must be borne in mind that one or the other party may afterward, in dissatisfaction with the award, seek to avoid compliance. Therefore, party representatives and arbitrators alike must

seek to be thorough and as rule abiding as possible. All applicable and binding regulations must be considered. [Harrison, 1979] The arbitrator's responsibility is far from moot and both he and the disputing parties must understand their position in no uncertain detail. [Updegraff, 1970]

B. THE ARBITRATOR'S RESPONSIBILITY

The responsibility of presiding over the hearing is that of the arbitrator. [Coulson, 1978] Basically, he is to ensure that the hearing is conducted in a fair and impartial manner. There are certain procedural requirements that must be met in order for the award of the arbitrator to be immune from appeal. Those briefly stated are:

(1) All interested parties are to be notified of the time and place of the hearing.

(2) Evidence will be allowed without restriction.

(3) Full cross-examination of witnesses will be granted.

(4) Oral argument will be permitted at the conclusion of the evidence presentation.

(5) Reasonable opportunity will be granted to submit written briefs.

[Loevi, 1978]

Prior to the hearing, the arbitrator will be required to inform himself of the extent of his authority and any

particular procedural requirements of the case at hand. He should outline to the parties involved his method of conducting the hearing. [Coulson, 1978]

He also has the responsibility to ensure that the issues have been clearly defined and that the "burden of proof" is not an issue of any one party but rests equally with both sides. [Updegraff, 1970; Coulson, 1978]

C. HEARING PROCEDURES

The format of the arbitration hearing will usually vary very little from hearing to hearing, but the arbitrator may vary the procedure at his own initiative or at the request of a particular party. [Harrison, 1979]

The customary order of the proceeding usually follows an itinerary as indicated below:

(a) The acceptance by the arbitrator into the record of any information or evidence that the parties have jointly agreed to.

(b) The decision of "who goes first."

(c) Opening statements by the initiating party, followed by a similar statement by the other side.

(d) Presentation of witnesses and evidence by the initiating party, with cross-examination by the corresponding party.

(e) Summation by both parties, closing statements, briefs and written transcript submission.

[Harrison, 1979]

Each step in the itinerary will briefly be discussed below:

1. Mutually Agreed Upon Evidence and/or Information

Mutually agreed upon facts will be referred to as "joint submissions." The acceptance of any joint submissions and stipulations into the record, that both parties have agreed upon, should be the first order of business by the arbitrator. [Harrison, 1979] The receipt of an agreement of issue(s) to be resolved starts the hearing off ahead of schedule; if the issue is defined and jointly agreed upon, this will reduce the "burden of proof" each party has to establish in presenting its position. (Loevi, 1978; Coulson, 1978]

By stating facts that are agreed upon by both parties, the obvious advantage is the elimination of unnecessary time and effort spent establishing the authenticity and relevance of uncontested facts. [Harrison, 1979]

2. Who Goes First

The union, being the party that normally initiates a grievance, usually bears the burden of proof, proving that the management of the federal agency has violated the labor agreement that is currently in force. The union will normally go first in the hearing proceedings. This is the nature of most arbitration hearings, except in disciplinary cases, where management has initiated action for reasons it

feels are important enough to enforce, therefore bearing the "burden of proof." [Harrison, 1979; Coulson, 1978]

This order of case presentation, being the norm, may be changed by the arbitrator in the name of efficiency and equity, or by the agreement of the two disputing parties. [Harrison, 1979] The bottom line is that both parties bear the burden of proof as both have to fully support their claims with substantiated evidence. Who goes first should not, in the long run, dramatically change the decision of the arbitrator.

3. The Opening Statement

The opening statement lays the ground work for the testimony of the witnesses and helps the arbitrator to understand the relevance of the oral and written evidence to be presented. It gives each party the opportunity to brief the arbitrator on the case from its own viewpoint. [Harrison, 1979]

The opening statement should identify the issues, indicate what is to be proved and specify the relief sought. [Harrison, 1979] The obvious benefit of making an opening statement, if it is well prepared, is that the arbitrator will be better able to view evidence presented during the hearing in a light of a past concise and congruent summation. [Coulson, 1978]

Because of the importance of the opening statement, some party representatives present it in written format. This

makes the initial statement a part of the permanent record. In any event, the opening statement should be made orally, whether it is chosen to submit a written version or not. The oral presentation adds extra emphasis to the case's position. [AAA, 1979]

4. Presentation of Witnesses and Evidence

Certain documentary evidence may be essential in presenting the case. Documentary evidence, such as the labor agreement or at least the section pertaining to the disputed items, should always be submitted. Other documented evidence that may require submission is official minutes of contract negotiation meetings, wage data, relevant correspondence, etc. [Updegraff, 1979] Regardless of the type of documentary evidence presented, each piece should be identified and properly authenticated. A copy should be given to the other side for scrutiny. The significance of each document should be highlighted with key words and phrases underlined to focus the arbitrator's attention on the essential parts. [Harrison, 1979]

The presentation of witnesses by either party is called direct examination. The process of examining the witness by the opposing party is called cross-examination. In both cases, the first thing that takes place is the establishment of the identity and competence of the witness with respect to the issues at hand. [Harrison, 1979]

The witness, during direct examination, should be allowed to tell his story in his own words and without interruption. [Harrison, 1979] Leading questions are allowed but not recommended and should only be used to help emphasize points already made or in leading the witness back to the main theme of the testimony if that witness has gone astray. [Coulson, 1978; Loevi, 1978]

The objective of cross-examination is to allow the arbitrator to both listen to answers and observe the witness' demeanor when subjected to question by the opposing party. Every witness is subject to cross-examination. Cross-examination should be used to disclose facts that the witness may not have brought out in direct testimony. Cross-examination also gives the opposing party the opportunity to correct "misstatements" by placing those statements in their correct perspective, and it also allows for the intensive scrutiny of the witness' reliability and credibility. [Harrison, 1979]

5. The Summary

Before the arbitrator closes the hearing, he will allow each party the opportunity to review the evidence, summarize the facts and issues, and justify the decision the arbitrator is being asked to make. This is accomplished in a "closing statement." This closing statement is the most important opportunity that is provided to either party.

This last opportunity to convince the arbitrator that their party's position should be upheld, taken seriously, attacked with vigor and done as professionally as possible. This is the last chance to sway the arbitrator and to refute points made by the other side. [Loevi, 1978]

D. POST-HEARING PROCEDURE

After the summation by both parties, the arbitrator will normally declare the hearing closed. But prior to this, the arbitrator will ask if the parties wish to file a post-hearing brief. [Coulson, 1978] This post-hearing brief is a valuable tool as it can be used to enhance a particular point of view or discuss weaknesses in the opposing party's presentation. [Updegraff, 1979] The arbitrator will then study the newly received material and include it in his decision process. [Coulson, 1978]

E. AWARDS

The award should be limited to the issue(s) as defined by the arbitration agreement. It should decide each claim and should be final. At this point, the arbitrator's obligation and power is terminated and his decision stands unless both parties mutually agree to reopen the case. In such event, the arbitrator's power is restored and he again becomes the judge of all continuing proceedings. [Updegraff, 1979]

VII. ARBITRATION: AN EVALUATION AND ANALYSIS

A. GENERAL

Briefly described, this evaluation applies a conceptual framework that systematically investigates, by formal techniques, the costs and benefits of an already established situation. [DODinst, 1972]

Considering the importance of negotiating labor disputes under law and, of equal importance, of funding the process with tax dollars, there is a clear responsibility to investigate the effectiveness and efficiency of arbitration itself. Arbitration must be proven to benefit the people it serves such that the outputs derived outweigh the costs, be they monetary or otherwise.

The evaluations of costs and benefits for public sector organizations have unique problems that are associated to their (the public program or agency) special situations. These costs and benefits are mostly measured in non-quantifiable terms, but are measured nevertheless. Economic analysis is, of course, more accurate when applied to situations in which outputs can be defined in terms of physical yield. It may, however, be applied, with less precision, when dealing with non-quantifiable outputs, if the benefits are accurately defined and measured in terms of "relative benefit" or "relative cost." [Gramlich, 1981]

In such economic analysis, arbitration is frequently defined as an independent variable that affects such outcome variables as wages, strikes or bargaining incentives. Less frequently, arbitration is viewed as a dependent variable reflecting such concepts as "interest group conflict." [Feville, 1979] This economic analysis considers three potential primary benefits and two potential costs. Also, process and result measures will be investigated and conclusions presented as to the level of effectiveness and efficiency insinuated by those measurements.

B. BENEFIT CRITERIA

This analysis will establish three basic criteria for deriving benefits from compulsory arbitration in the public sector. These benefits are:

1. Arbitration as a protector of the public interest.
2. Arbitration as a protector of employee interest.
3. Arbitration as a regulator of group conflict.

[Feville, 1979]

1. Arbitration as the Guardian of the Public Interest

The most visible benefit of binding arbitration is the guarantee of "no strikes" by public employees. [CSRA, 1978] This stipulation within current law prevents the disruption of public services such as mail and air controller services. To measure this output it will be necessary to compare a federal agency with a private concern

which does not have the "illegal to strike" protection. This will be a difficult chore. It should be noted that arbitration is not a perfect "no strike" insurance as it, of course, does not protect against "illegal" strikes, work stoppage or slowdowns. These conditions are seldom realized in the federal sector as federal employees are acutely aware that the "illegal to strike" law could exist without arbitration and that arbitration provides them a vehicle for airing their views.

2. Arbitration as the Guardian of the Employee Interest

This "benefit" is diametrically opposed to the concept that arbitration can be both representative of employee interest and also be a limiting factor of the collective bargaining process. [Feville, 1979] By imposing compulsory arbitration on employees and taking away the right to strike, it (arbitration) seems to limit the means by which labor can inflict cost on management.

When dissecting arbitration, it follows that its foundation is built on the rudimentary principle of bargaining in "good faith." Using this "good faith" concept, at least in the public sector, tends to increase or at least does not diminish substantially the negotiating power of federal employees, therefore giving credence to the claim that arbitration does not "cost" and is probably a "benefit" to federal employees. [Harrison, 1979]

To prove that this "benefit" is a valid tool, an investigation of the distribution of outcomes must be accomplished. This investigation would compare the disputing parties' level of issue submissions (goals) with actual goal attainment (i.e., award winners and award losers). [Feville, 1979] Also, more specifically, to prove or measure the benefit relationship of arbitration as a guardian of employee interest, one may compare how arbitration has impacted on wage demands in the public sector as compared to the private sector. [Anderson, 1981; Anon, 1975]

3. Arbitration as a Regulator of Interest Group Conflict

Arbitration impacts on interest group conflict, and this impact affects a much broader political base than is considered "normal" and, of course, the narrower perspective of simple labor-management relations. The point of view that arbitration is a useful took in regulating conflict seems valid. Unionization of public employees highlighted claims upon scarce public resources. [Updegraff, 1970] This is not to say that these claims against public resources did not already exist; but it is to say that unionization brought them to the public eye in a very dramatic manner. Collective bargaining increased labor-management confrontation and arbitration, or third party impasse resolution, in practice, relieved inter/intra-organization pressures caused by that confrontation. [Updegraff, 1970]

Arbitration performs this regulatory benefit function through proven impartiality of award decisions, compromising and face saving techniques. As a result of the inherent attributes of arbitration, the process will absorb those interest group pressures that might otherwise cause serious disruptions. [Feville, 1979]

Empirical testing of this function is extremely difficult and can be considered a quantitative output only by those who place a high judgmental value on potential stability.

C. COST CRITERIA

The cost criteria are established by looking at two non-physical yields, but are explained, measured, and evaluated by two rational phenomena. These phenomena can be related to physical outputs. The cost criteria are summarized in Figure 7.1.

1. Arbitration as an Inhibitor of Representative Government

The arbitration process, as presently enforced, can be considered contrary to the American political system of a representative democratic government. This premise is based on the idea that labor and political systems alike should be structured to reflect the will of the governed. This inhibitor function countermands the notion of accountability for public decisions and increases bureaucratic insulation around the problem. [Feville, 1979]

Arbitration's Purpose or Impact	Normative Premise	Operational Mechanisms	Measurement Tests
Protector of the public interest	The public needs/ wants protection from strikes.	A binding award prevents strikes.	Absence of strikes.
Protector of employee interests	Employees should bargain from position of equal strength with management.	Union can invoke arbitration. Employer must accept award.	Comparison of awards outcomes where arbitration is not available.
Regulator of interest-group conflict	There is a need for social and political stability.	Third party decision making absorbs conflicting group pressures.	Comparison of overt labor relations conflict with and without arbitration.
Inhibitor of representative government	Public decision processes should be accessible and accountable	Public authority is delegated to nonaccountable third parties.	Comparison of accessibility and accountability of labor decision processes with and without arbitration.
Inhibitor of genuine collective bargaining	Bargaining incentives should be protected and strengthened.	There exists a high probability of satisfactory award and low usage costs.	Comparison of bargaining behaviors with and without arbitration.

Figure 7.1 Benefit-Cost of Arbitration

In other words, arbitration allows the allocation of public resources by a non-elected third party, who is not directly responsible for his decisions. It also intensifies bureaucratic control by labor professionals over governmental employee-employer relations.

2. Arbitration as an Inhibitor of Genuine Bargaining

Arbitration can have a costly impact on the incentive to bargain in "good faith." This concept is based upon the premise that collective bargaining is a valuable tool and should be protected. Arbitration may be too easily used as an escape device from having the parties make difficult

trade-off choices among disputed issues. It would be a simple matter to forfeit the bargaining obligation to third party resolution as either party normally can invoke arbitration if it feels it to be to its advantage. [Feville, 1979]

D. ARBITRATION RESULTANT PHENOMENA

As mentioned above, two by-products that can be evaluated are realized. The evaluation of these by-products helps determine if the non-quantifiable costs, as pointed out in the section on cost criteria, are legitimate in nature.

1. The Impact of the "Chilling Effect"

The "chilling effect" comes about as the result of compulsory arbitration in the federal sector. [Feville, 1979] Under this concept, genuine negotiation efforts are inhibited as the disputing parties hold back concessions in anticipation of submitting the issues to an arbitrator. It poses this problem because labor and management alike understand that arbitration is a compromising process and they ask themselves why they (either party) should concede on any of the issues if an arbitrator tends to split the difference between the union and management position. [Anderson, 1981; Feville, 1979] It predicates the philosophy that any concession or compromise prior to arbitration may result in a less favorable settlement for the conceding party.

The hypothesis that the "chilling effect" is significant may be examined by sampling the percentage of negotiation issues settled at each stage of the bargaining procedure. The higher the percentage settled at arbitration, the greater the "chilling effect" impact. This impact is a cost directly to the collective bargaining system as conceived. Also, by assessing the amount of compromising activity by both parties and the reduction of total issues remaining at the point of impasse, some measure indicating the presence and impact of the cost function is achieved.

2. The Impact of the "Narcotic Effect"

This phenomenon stems from the premise that disputing parties, over time, may come to rely solely on impasse resolution (arbitration) to settle all negotiations between them. Disputing parties see very little or no benefit from resolving by, or at least devoting the enormous time required to, the collective bargaining process when a third party can resolve the disputed issues more quickly and in a satisfactory, if not desirable, fashion. [Feville, 1979]

The presence and impact of this "effect" should be indicated by a rise over time in the proportion of cases going to final arbitration.

E. EVALUATION OF SELECTIVE COSTS AND BENEFITS

1. Evaluation of Arbitration as Guardian of the Public's Interest

Public service agencies are virtually strike free institutions. [CSRA, 1978] This gives those agencies a substantial benefit over private institutions where striking is considered part of the collective bargaining process. [Anon, 1975]

The air-controller strike is a good example as to the benefit of an "illegal to strike" law dealing with public services. The air-controller strike cost tax payers millions of dollars in service, thousands of dollars in negotiation costs and untold inconvenience and safety. These costs would be part of an enormous recurring expense if strikes occurred more often in the public sector; presumably strikes would be more frequent if arbitration were not compulsory.

Comparing this situation with private industry, it seems that the costs incurred from strikes are isolated in nature and do not affect the enormous proportion of the population that a strike against an agency performing public services would.

Arbitration tends to produce benefits when investigated as a guardian of public interest although there seems to be a cost associated with the lack of the right to strike in public employment and this will be discussed later.

2. Arbitration as a Guardian of the Employee's Interest

This benefit could be measured by investigating the distribution of the outcomes of grievance issues. Issues, for administrative purposes, are normally divided into categories (i.e., general, economic, etc.). [FMCS, 1981] The economic category includes issues dealing with wages and pay, fringe benefits and severance pay. The investigation of the distribution of outcomes compared the federal employee's goal attempts with goal attainments for economic issues going to arbitration. Simply put, it is the ratio of award winners to award losers.

Pro labor awards had been handed down 46 percent of the time during this period. [FMCS, 1981] This single statistic, although simplistic, indicates that employee rights are being seriously considered and acted upon and that arbitration does give fair consideration to the benefit of the federal employee.

Anon states that earnings and fringe benefits of public employees in the Federal Government are catching up and surpassing those in the private sector. [1975] This is a tangible indicator that arbitration is working as a benefit to the federal employee. This raises the question that if this is such a good benefit to the federal employee then who is it costing. This issue will be addressed later.

F. THE MEASUREMENT OF THE "NARCOTIC" AND "CHILLING" EFFECTS

1. The "Narcotic Effect"

As previously discussed one indication of the presence of this effect would be a growth in the fraction of mediation cases reaching arbitration over time. Figure 7.2 lists the cases arbitrated each year starting with 1976 and ending in 1980. As shown by Figure 7.2, the number of cases being handled at the arbitration level has been increasing and so has the proportion of total mediation cases.

Year	1976	1977	1978	1979	1980
Total Cases	5,550	6,935	8,155	7,025	7,539
Fraction Reaching Arbitration	.26	.26	.36	.30	.31

[FMCS, 1981]

Figure 7.2 Total Arbitration Award Cases Closed: FY 1976-1980

The arbitration process handled an average annual case load of 7040.8 with a total increase over the five-year period of approximately 36 percent. This alone proves nothing, but if compared to the total cases being handled at the mediation phase, it is noted that this increase is not simply due to a total increase in cases alone.

The level of mediation activity (case load handled during the mediation phase of collective bargaining) is depicted below in Figure 7.3.

Year	1976	1977	1978	1979	1980
Total Cases	21,179	25,882	22,882	23,142	24,178

[FMCS, 1981]

Figure 7.3 Total Mediation Cases Closed: FY 1976-1980

The mediation activity for the five-year period averaged some 23,575.6 cases annually with a total growth of 14 percent, compared to the 36 percent growth in number of cases reaching arbitration over this period. In 1976, 26 percent of the mediation cases reached arbitration; in 1980 31 percent did. Clearly, a larger proportion of disputes are now being referred to binding arbitration for settlement. It seems reasonable that the growth be attributed to the "narcotic effect" and thus indicates a direct cost to the collective bargaining process.

2. The "Chilling Effect"

The total number of cases does not tell the whole story. The number of issues being negotiated within those cases must also be examined to see if there has been an increase or decrease in that measure.

Figure 7.4 depicts issue activity from 1976 through 1980, number of issues mediated and number and fraction of those issues settled at arbitration

Year	1976	1977	1978	1979	1980
Total Arbitration Issues	6,855	6,935	8,155	8,270	8,482
Total Mediation Issues	42,485	50,816	46,734	49,523	49,569
Fraction	.16	.14	.17	.17	.17

[FMCS, 1981]

Figure 7.4 Arbitration Issue Activity: FY 1976-1980

The information provided by the above table indicates that the fraction of issues settled at arbitration remained almost constant at approximately 17 percent. This statistic indicates that about the same fraction of issues were being handled proportionally by arbitration as total number of issues increased over time.

When analyzing these two cost phenomena, the data supports the position that proportionally the number of cases reaching arbitration has increased relative to those being settled in the other phases of the collective bargaining process. While proportionally, the number of issues reaching arbitration relative to those being settled at prior

collective bargaining proceedings have remained constant as a fraction of issues reaching mediation, the proportional increase in cases and constant level of issues being settled at arbitration indicates a strong and substantial cost being incurred and seems to support the "narcotic," but not the "chilling," cost effects as being substantially present.

G. IMPACT OF ARBITRATION ON WAGES

Anon says that bargaining in the federal government is not a two-sided affair as in private industry. He continues with the following statement:

> It's multilateral bargaining. You have got several actors on the management side. It's tough to get a consensus on any issue. [1975]

This problem is compounded by the fact that government labor relations are intertwined with politics and that negotiators have a political image to consider. [Anon, 1975]

This thesis will not cover all political costs and benefits of the political influence of arbitration awards but will cover those dealing with wage scales. Anon states that it is generally accepted that in many instances, binding arbitration provides employees with higher benefits at less cost (to the employee) than allowing the employees the right to strike. [1975] This indicates a cost to the employer higher than it would be if he were the victim of a strike.

For the tax payer, Charles R. Perry states that it may be better to allow strikes, sacrifice the convenience of uninterrupted service, and by that tactic negotiate from a power position to hold down wages. [1974]

Since the legal formation of public unions, there has been an increasing push for wage parity between private and public workers. This is substantiated by FY 1980's thirty-third annual report by the Federal Mediation and Conciliatory Service. This report indicates that there had been an increase of 7 percent in submission of wage grievance issues during FY 1973 and 1977 and that those submissions then remained fairly constant as a fraction of total issues submitted FY 1978 through 1980. [1981]

It should be noted that there was an actual drop in those issues between the years 1979-1980 and this was the only decrease over the period examined although the general upward trend of 1978-1980 (up 6 percent in two years) appeared significantly less than the trend for 1975-1978 (up 41 percent in three years). Without further data, one cannot say whether the upward trend was broken, presumably because governmental employees were becoming satisfied with their pay-scale and because private-governmental wage parity has been accomplished, or whether it was merely an accident with the upward trend to start again.

Figure 7.5 provides the historical data on the total wage and pay issue activity between 1975-1980.

Year	1975	1976	1977	1978	1979	1980
Total Issues	729	912	992	1,026	1,120	1,091
Fraction of Mediation Issues	.12	.16	.17	.17	.19	.18

[FMCS, 1981]

Figure 7.5 Economic, Wage and Pay Activity: FY 1975-1980

The question of wage parity between private and public employees is addressed by the statistics published in the report by the Advisory Commission on Intergovernmental Relations in 1975. Figure 7.6 displays the Commission's findings.

	Average Annual Increase	18 Year Increase
All Private Industry	4.7%	129.3%
Manufacturing	4.6%	124.0%
Federal Government	5.9%	182.9%

[Anon, 1975]

Figure 7.6 Private-Public Wage Statistics: FY 1955-1973

The data depicted in Figure 7.6 indicates that private industry has not experienced as high a rate of increase in pay as the federal sector, and partly confirms that

arbitration does not inhibit the accomplishment of wage parity between the two sectors. The federal sector has enjoyed an increase in wages that was 43.6 percent higher than the increase in the private sector during the period 1955-1973 and it follows that arbitration may have played a significant role in providing this benefit to the federal labor force.

Fringe benefits further complicate evaluating arbitration's effect on wage comparisons, but in government, workers generally receive superior benefits. The difference in pensions is especially dramatic. Public workers generally enjoy larger benefits and are able to take advantage of them earlier than workers in private industry. [Anon, 1975]

To summarize, arbitration appears to have positively affected wage parity between the private and public sectors. This is shown by the large increase in the economic issue category from 1973 to 1976 and then the breaking of the increasing trend or the tapering off of those types of grievances between 1977 and 1978. This tapering off possibly indicates to some degree satisfaction by public employees with the wage and pay issue. The benefit to public employees is further evidenced by the statistics provided by the Advisory Commission on Intergovernmental Relations which stated substantial gains in wage parity.

H. COST OF THE ARBITRATOR

Arbitration has been criticized because of the growing cost of the arbitrator himself. [Ingrassia, 1979] Figures 7.7 and 7.8 provide cost data on days charged to arbitration and related expenses and fees.

Year	1976	1977	1978	1979	1980
Travel Days	.32	.33	.31	.33	.33
Hearing Days	.89	.87	.99	.99	1.00
Study Days	1.67	1.76	1.78	1.82	1.88
Total	2.80	2.96	3.09	3.14	3.21

[FMCS, 1981]

Figure 7.7 Average Number of Days Charged per Arbitration: FY 1976-1980

Dollar Amount					
Year	1976	1977	1978	1979	1980
Fees	581.72	644.70	735.53	804.57	883.59
Expenses	80.76	88.34	95.00	107.31	128.15
Total	662.39	773.04	830.54	911.83	1,011.74
Total in Constant 1972 $	501.43	524.35	553.32	560.09	570.32

[FMCS, 1981; USDC, 1981]

Figure 7.8 Average Fees and Expenses per Arbitration: FY 1976-1980

Figure 7.9 provides a convenient summary trend line analysis of days, fees, and expenses charged

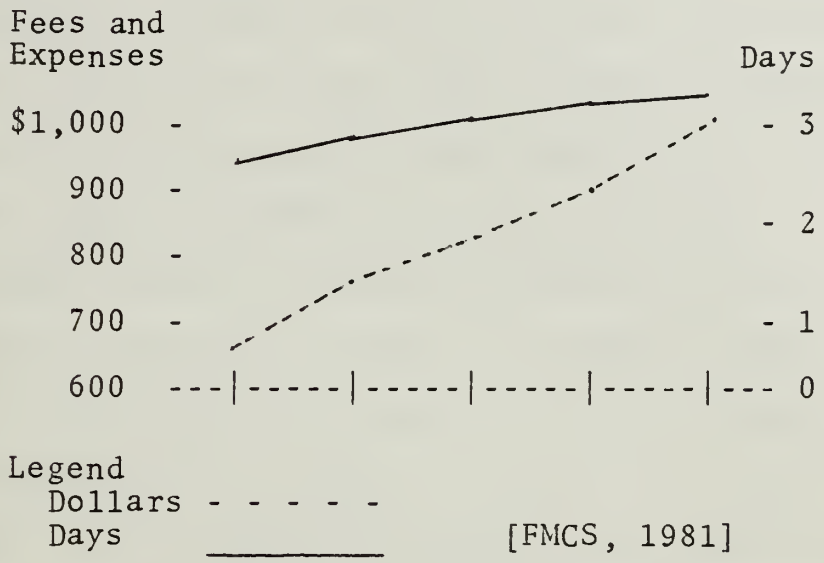

Figure 7.9 Days, Fees and Expenses Charged Summary

These statistics indicate an increase of 14.6 percent in days charged and an increase of 52.7 percent average total expenses charged over the five-year period. It should be noted that the annual average increase in expenses of 11.2 percent was more than inflation (there was real growth) for the same time period and the average annual growth was 3 percent.

I. SUMMARY

This chapter attempted to analyze the more significant costs and benefits of arbitration. Many could not be

quantified but at least an indication of direction of change in magnitude could be estimated by examining data which it is plausible to assume was highly correlated to the actual costs/benefits. Overall it was concluded that arbitration advocates can point to three major benefits that arbitration might provide while skeptics could emphasize two sets of cost that might be imposed by these procedures.

The most visible rationale for arbitration has been perceived as the need to protect the public from the withdrawal of supposedly vital public services (although such perceptions seem to be based on little or no empirical evidence). It is generally accepted that arbitration helps accomplish this strike-prevention objective and is a benefit in that respect to the public-at-large.

It is concluded that arbitration protects the interest of the public employee by providing him a viable vehicle for fair and objective grievance settlement. The direction of wage growth seems to indicate the existence of benefits being derived from the collective bargaining process of which arbitration is playing an ever-increasing role. It is noted that although wage parity is being accomplished it is uncertain whether the wage and pay growth in the federal sector can be directly tied to arbitration. It follows that arbitration probably causes a cost to the tax paying public in the form of increased wages to federal workers. This

cost is undeterminable from the data investigated in this thesis.

The presence of the "narcotic" effect could not be absolutely proven, but the indicator used to measure its effect inferred its presence. This presence and the associated effects have increased both the normative and operational expense in the arbitration area (i.e., the cost to the tax payer in direct representation for indirect allocation of public funds and fees and expenses of the arbitrator).

The presence of the hypothetical "chilling" effect or of its substantive influence upon the collective bargaining process in the federal government could not be confirmed.

VIII. SUMMARY AND CONCLUSIONS

This thesis provided an information guide covering those events leading up to and during the arbitration process and examined certain selected costs and benefits associated with arbitration in the public sector. More specifically, the guide has presented information on such topics as the legal relationship between arbitration and the rights and duties of employees, managers, federal agencies and labor organizations in complying with legal restraints imposed by the Civil Service Reform Act of 1978.

An attempt was made to fill an information gap at the mid-manager level. The guide discusses the "arbitrability" of grievance issues, the selection of an arbitrator, and case preparation and presentation.

In some instances this thesis provided a systematic investigation using techniques that required establishing cost and benefit criteria using quantifiable measurements when possible and descriptive evaluation of related data when physical outputs were not available.

The cost and the benefit of a program can be seen from many different perspectives; what is a cost to one is a benefit to another. Arbitration has both rewards and cost to both the tax paying public and the public employees who use the process as part of the collective bargaining system.

Since the formation of federal unions, conflict has existed between management and labor. Arbitration safeguards employee interest by providing a means of grievance settlement that is in "good faith" and awards by neutral third parties, and safeguards public interest by providing a vehicle that resolves conflict without strikes or public service interruptions. There is a lot of give and take in the explanation of these costs and benefits as that in many instances the costs and benefits overlap. No fine line is drawn and it seems to be a matter of relative degree as to what point the costs outweigh the benefits and who should pay the costs and who should reap the benefits.

Two phenomena or by-products resulting from arbitration were identified as means to measure the degree of costs associated with the collective bargaining process with varying degrees of impact. Those by-products, the "chilling effect" and the "narcotic effect" are not precise measurements but their trends can be inferred from other, indirect, measurements. The conclusions were that over time the fraction of cases reaching arbitration has increased. From this it was inferred the "narcotic effect" was significant, therefore indicating an impact or cost to the collective bargaining process. That cost is an inhibition of the use of the pre-arbitration phases for grievance settlement. The impact of the "chilling effect" was inconclusive since the

number of issues reaching arbitration in proportion to those being settled at the pre-arbitration level remained almost constant. These two measurable phenomena counter-balance each other to some extent. Although the total number of cases is rising, the issues reaching arbitration are the more complex problems that normal grievance procedures have been unable to handle.

One selected area investigated was the wage and pay category of issues. This area was identified for scrutiny as it proved to be the more convenient supply of information available. The study attempted to tie the trend of public employee wages to compulsory arbitration. It is clear that the gap between the public and private sectors has been narrowed in recent years. This evaluation addressed the questions of whether compulsory arbitration inhibits the earning power of public employees and whether the tax payer benefits by having a third party allocate public resources without direct representation. The evaluation of relative wage growth of public and private sectors during the period of compulsory arbitration led to the conclusion that, in fact, arbitration may have enhanced federal employees' chances for greater wage rates than their private counterparts. Not only have the wages of public employees increased faster over the period investigated but this increase has come at less cost to the individual employee. This is

explained by the fact that when private employees strike it costs them in the form of wages and benefits lost during the strike period. The net gain would then be the difference between the gains achieved by striking and those lost by the same action. The absence of the "right" to strike in the public sector lends no opportunity for such cost to be incurred by the public employee and therefore his net gain over time has been substantially greater. Though the public employees' gain has been greater so has the cost of those gains been greater to the tax paying public. As noted, from 1955 to 1973, wage and pay in the federal government increased 182.9 percent while private industry increased only 129.3 percent during this period.

It is possible that the wage increase statistics are misleading in that the big gains by public workers are representative of a "catch-up" from historically depressed wages. Yet another indication of "relative" gains in the public sector is that over a period when there was considerable pressure to reduce civil service, it actually increased by 5.4 percent, totaling about 4 percent of the total workforce by 1975. [BLS, 1978] It follows that wages paid or offered to potential federal workers were in line and competitive with those being offered in non-public jobs. This statistic cannot be directly tied to arbitration but infers the absence of a "substantial" cost being perceived by potential and government workers.

The cost of the arbitrator is a measurable output and requires attention when deciding to carry a case to arbitration. The arbitrator's costs have increased at an annual average rate of 11.2 percent (in current dollars). This 11.2 percent is above the inflation rate realized during the same time period and, although these costs are and should be inhibited, they are increasing at a rate of only 3 percent annually in real dollars.

This research seems to support the following conclusions: First, the existence of arbitration in the public sector has not eliminated bargaining, for the majority of cases (70 percent) and issues (83 percent) are settled in the pre-arbitration phases of the collective bargaining process. Second, on the other hand, there seems to be an increasing dependence, both in labor and management alike, on arbitration for grievance settlement as shown by the increase in proportion of cases going to arbitration. Third, arbitration seemingly has the characteristic of being a "satisfier" in that it appears to provide political and social stability within the public workforce while, fourth, accomplishing an essential goal of protecting the rights of federal employees. Fifth, the contribution that arbitration makes toward protecting these rights, including economic issues, has an associated cost to the tax payer in the form of increasing pay and benefits for those same public workers. The total

cost to government, associated with arbitration, appears to be rising in total dollars spent; but, from the data evaluated, it cannot be determined if those costs outweigh the benefits derived.

Perhaps the most important conclusion that can be drawn from these results is that compulsory arbitration is likely to subvert and attenuate collective bargaining if disputing parties view that process as the least costly alternative for resolving grievance issues.

A. SUGGESTION FOR FURTHER RESEARCH

The results of this paper suggest the existence of a number of rewarding research topics. First, an empirical analysis of the direct cost of arbitration to the tax payer. Second, a detailed study of the tendency of arbitrators to split the difference between the disputing parties' final position. Finally, an analysis of the degree to which political interference and budget restraints affect arbitrators' awards.

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